

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

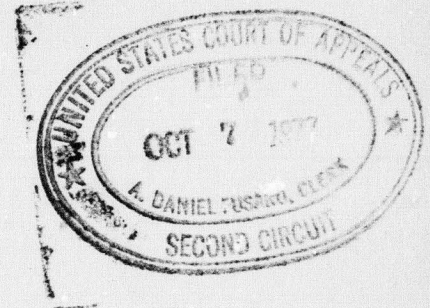
77-1338

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :
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Plaintiff-Appellee, :
:
-against- :
:
RAFAEL JESUS ALEJANDRO, :
:
Defendant-Appellant. :
-----x

B p/s
Docket No. 77-1338



BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MARTIN ERDMANN, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,
Of Counsel.

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QUESTION PRESENTED

Whether the district court's failure to advise appellant of the maximum possible penalty provided for his offense was violative of Rule 11(c) of the Federal Rules of Criminal Procedure, requiring vacatur of the guilty plea.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (Bramwell, J.) entered on May 20, 1977, after a plea of guilty, convicting appellant Rafael Jesus Alejandro of conspiring to distribute heroin, in violation of 21 U.S.C. §§841(a)(1) and 846, and sentencing him to five years' imprisonment and to a five-year term of special parole.

This Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

On March 11, 1977, an indictment* was filed, charging appellant and co-defendants Alvaro Henao and Mario Agudelo Stevens with conspiring to distribute 71 grams of heroin on January 25, 1977.

On April 1, 1977, appellant appeared before Judge Bramwell and sought to withdraw his previously entered plea of not guilty and to enter a plea of guilty to the one count of the indictment

*The indictment, included as "B" to the separate appendix to appellant's brief, contained seven counts. Appellant was charged in only one count, Count Three.

with which he was charged (Appendix C at 3*).

After informing appellant of the constitutional rights he was waiving by his guilty plea (3, 4), Judge Bramwell told him that "if he pleads guilty the Court may ask him questions about the offense to which he offers to plea" (4). The district judge then read the relevant count of the indictment, defined the crime of conspiracy, and established a factual basis for the plea** (5-9).

As to the maximum penalty provided for the offense charged, Judge Bramwell told appellant "that the maximum sentence which may be imposed is a prison term of 15 years and/or a fine of \$25,000 plus a special parole term of at least three years" (12). After the district judge explained that special parole was in addition to, and not in lieu of, any other term of parole provided by law, appellant asked for further explanation about this aspect of the sentence (13). The following colloquy then occurred:

THE COURT: A special parole term is a minimum of three years in this case, but it's in addition to any parole. It's a parole term.

THE DEFENDANT: If I'm given an additional parole term, I still have to comply

*Minutes of the plea proceeding are annexed as "C" to the separate appendix to appellant's brief. Numerals in parentheses refer to pages of the transcript of that proceeding.

**During the proceedings, the Assistant U.S. Attorney indicated that as a result of appellant's plea, the Government had agreed to a dismissal of charges against appellant that were then pending in the Southern District of New York (9-10).

with the three years special?

THE COURT: It's a minimum parole term. It's a minimum of three years in this case.

Now, ask Mr. Alejandro, has your lawyer made any prediction or expressed any opinion as to what sentence will be imposed?

THE DEFENDANT: Yeah. He more or less told me, he has told me the maximum.

THE COURT: What did he tell him as to the maximum?

THE DEFENDANT: 15 and a fine.

THE COURT: I see.

(13-14).

Judge Bramwell then accepted appellant's guilty plea, without informing him that the special parole term was without statutory maximum and could be for any length up to life, or that the court could place appellant under oath, question him about the offense, and his answers later used in a prosecution for perjury or false statement.

On May 20, 1977, appellant was sentenced to a term of imprisonment of five years and to a five-year special parole term.

ARGUMENT

THE DISTRICT COURT'S FAILURE TO ADVISE APPELLANT OF THE MAXIMUM POSSIBLE PENALTY PROVIDED FOR HIS OFFENSE WAS VIOLATIVE OF RULE 11(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, AND REQUIRES VACATUR OF THE GUILTY PLEA.

In accord with the amendments to Rule 11(c) of the Federal Rules of Criminal Procedure, this Court's decision in United States v. Journet, 544 F.2d 633 (2d Cir. 1976), established that, before accepting a guilty plea, the district judge must explicitly advise the defendant about the specific items and matters enumerated in the rule. The matters specified include not only those of a constitutional nature, but also of the length of possible sentence. The requirements of Rule 11 are mandatory, and violation of them necessitates that the plea be vacated:

[U]nless the defendant is specifically informed of each and every element enumerated in Rule 11, the plea must be vacated.

United States v. Journet,
supra, 544 F.2d at 636.

Indeed, "a major purpose" of the amendments to Rule 11 was to avoid "fine inquiries" and to impose "a detailed prophylactic check list." United States v. Saft, Docket No. 76-1271, slip op. 4599, 4614 (2d Cir., July 5, 1977); United States v. Michaelson, 552 F.2d 472, 477 (2d Cir. 1977); see DelVecchio v. United States, 556 F.2d 106, 109 (2d Cir. 1977) ("The policy behind

Rule 11 are important and should be strictly enforced").

Thus, the rule in question, Rule 11(c), requires that the court inform the defendant, inter alia, of the "maximum possible penalty provided by law." As explained in obvious terms by the Advisory Committee to Rule 11:

The objective is to ensure that a defendant knows ... what maximum sentence the judge may impose.

Advisory Committee Notes to Rule 11, 18 U.S.C. Rule 11 at 21 (1975) (emphasis in original).

Here, Judge Bramwell's advice did not comply with this requirement. Rather, in words almost identical to those found insufficient in Journet,* the judge told appellant "that the maximum sentence which may be imposed is a prison term of 15 years and/or a fine of \$25,000 plus a special parole term of at least three years" (12). However, in addition to this penalty, the crime to which appellant sought to plead -- 21 U.S.C. §841(a)(1) -- also subjected him to a possible lifetime term of parole. United States v. Journet, supra, 544 F.2d at 636; United States v. Sims, 529 F.2d 10, 12 (8th Cir. 1976); United States v. Rich, 518 F.2d 980 (8th Cir. 1975). Thus, appellant was never informed that the court could impose, as it did, a special parole sentence well in excess of the minimum three years.

*In Journet, supra, 544 F.2d at 634, Judge Costantino had told the defendant that "he could be sentenced to a maximum penalty of fifteen years and/or \$25,000 fine, with a minimum of three years special parole term...."

Under Journet, Judge Bramwell's failure to explain the maximum penalty is a substantial defect, and requires vacatur of the plea. Indeed, although Journet also involved a violation of 21 U.S.C. §841(a)(1), this Court specifically held that, to satisfy Rule 11 and validate the plea, the district judge must explain the extent of the possible special parole term:

The word "life-time" need not be used by the judge in delineating the maximum permissible parole term provided he clearly explains to the defendant the extent of the term which the court is authorized to impose.

Id., 544 F.2d at 536 n.4.

See also United States v. Saft, supra, slip op. at 4613.

The defect in the plea was not merely a technical failure to comply with the requirements of Rule 11; indeed, appellant's lack of knowledge of the possible special parole term and the importance he attached to it is reflected by his specific inquiry during the proceedings about this aspect of the sentence and by the fact that the lawyer then representing him did not tell appellant about the possibility of any term of special parole.*

During the course of appellant's guilty plea proceeding, which occurred five months after the Journet decision, the

*That appellant never learned of the possibility of life-time parole from the lawyer then representing him during the plea proceedings is clear from the record. At the plea, appellant stated that his lawyer had told him that the maximum penalty was a jail term of 15 years and a fine (14).

district court never advised appellant of the maximum permissible parole term to which he was liable under the relevant statute. This procedure did not comply with the requirements of Rule 11(c) and the explicit holding of Journet. Accordingly, the guilty plea must be vacated. United States v. Journet, supra.*

CONCLUSION

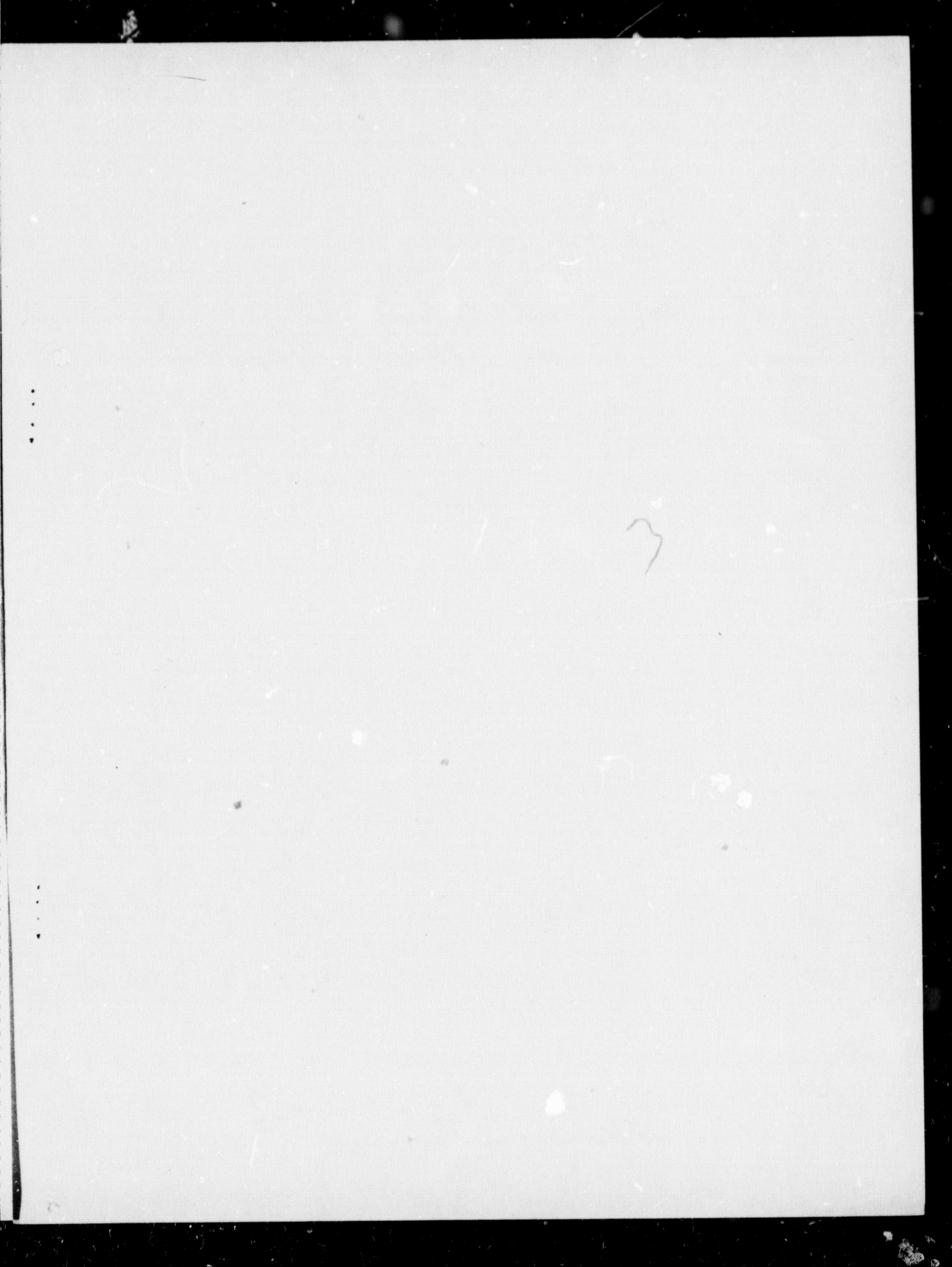
For the foregoing reasons, the plea must be vacated and the case remanded for further proceedings.

Respectfully submitted,

MARTIN ERDMANN, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,
Of Counsel.

*The district court also failed to tell appellant that if he pleaded guilty and was placed under oath, any statements he made could be used against him in a prosecution for perjury or false statement. See Rule 11(c)(5). However, this Court has found that this failure, where a defendant is not put under oath, will not require vacatur of the plea. United States v. Michaelson, supra, 552 F.2d at 477.



CERTIFICATE OF SERVICE

Oct 2 , 1977

I hereby certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Jonathan J. Lerner

